No. 78-906

In the Supreme Court of the United States

OCTOBER TERM, 1978

OTTER TAIL POWER COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 583 F.2d 399. The orders of the Federal Power Commission[1] (Pet. Apps. D, E) are unreported.

[1] The Federal Energy Regulatory Commission has succeeded to the responsibilities of the former Federal Power Commission in this case under the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565. In this brief, "Commission" refers to either body as required by the context.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-21) was entered on September 8, 1978. The petition for a writ of certiorari was filed on December 6, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission properly characterized an electric rate schedule filed by petitioner for transmission of power from government dams to several municipalities in Minnesota and South Dakota as a change in existing rates and service subject to temporary suspension pursuant to Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e).

STATEMENT

1. Under Part II of the Federal Power Act, 16 U.S.C. 824 *et seq.*, the Commission regulates the transmission, and the sale at wholesale, of electric energy in interstate commerce. Under Section 205(c) of the Act, 16 U.S.C. 824d(c), public utilities must file with the Commission schedules showing all rates and charges for these services. Undue preferences or advantages, and unreasonable differences in rates and service are unlawful. Section 205(b). By regulation (18 C.F.R. 2.4, 35.1(b) and (c), 35.12, 35.13), the Commission distinguishes between filings that change or supplement schedules for existing service, and filings for initial service.[2] The former are sub-

[2] But cf. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), and discussion, *infra*, page 11, note 5.

ject to investigation by the Commission under Section 205(e) of the Act, 16 U.S.C. 824d(e), and to suspension thereunder for up to five months, during which the existing schedules remain in effect. At the end of the suspension period, the utilities may implement the changes subject to refund of any charges found by the Commission to exceed just and reasonable levels. Initial schedules are not subject to suspension, however. They may become effective after thirty days notice (18 C.F.R. 35.3(a), and remain in effect unless and until the Commission finds, in a proceeding under Section 206 of the Act, 16 U.S.C. 824e, that they are not just and reasonable, or are otherwise unlawful, and orders them changed prospectively.

2. On October 4, 1976, petitioner tendered to the Commission a rate schedule that it claimed was an initial schedule. The schedule was to become effective January 1, 1977, and was to provide a rate of approximately 4.2 mills per kWh (kilowatt hour) for the "wheeling" (transmission by one utility of power generated by another) of power generated by Bureau of Reclamation dams on the Missouri River to 17 municipalities in Minnesota and South Dakota (Pet. App. D-1 to D-2). The new schedule was to replace a previously filed schedule under which petitioner wheeled Bureau power to these towns pursuant to a 1955 fixed-rate contract between petitioner and the Bureau that provided for "excess capacity transmission service" to the municipalities at a charge to them of 1 mill per kWh. Under the 1955 contract, peti-

tioner undertook to wheel power only insofar as its transmission line capacity exceeded that required for service to its own retail customers. That contract was to expire by its own terms on December 31, 1976 (Pet. App. A-4).[3]

The municipalities had also from time to time made individual "special municipal agreements" with petitioner providing, in addition, for "firming transmission service" at a further charge of 1.5 mills per kWh. Under these agreements petitioner undertook to deliver Bureau power to the municipalities by alternate means if it had no excess capacity available.

When petitioner filed its purported initial wheeling schedule, it also filed a notice of termination of the 1955 Bureau-Otter Tail wheeling contract, and notices of termination of the special municipal agreements, both to become effective December 31, 1976 (Pet. App. A-4 to A-5). By that date, many of the special agreements had expired by their own terms, and seven Minnesota towns had advised petitioner that they no longer wished to accept the special service. The other towns continued to receive the service under the agreements (Pet. App. A-5 to A-6).

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[3] An earlier case, *Otter Tail Power Co.* v. *FPC*, 536 F.2d 240 (8th Cir. 1976), affirmed the Commission's rejection of rate increases for the service covered by the 1955 contract filed by petitioner in 1975. The court agreed with the Commission that the contract, until its expiration, barred such unilateral increases under the doctrine of *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

3. The Commission accepted the tendered schedule and notices of termination for filing, but concluded that they involved changes in pre-existing service, and were not initial schedules. It ordered an investigation and suspended the schedule and notices of termination for five months (Pet. App. D-1 to D-11, E-1 to E-15). Thus between January 1, 1977, and May 31, 1977, petitioner was required to wheel Bureau power to the municipalities at the rate of 1 mill per kWh, instead of its proposed 4.2 mill rate, and also to provide firming transmission service for an additional charge of 1.5 mills to the towns which wished that service to continue.

The Commission rejected petitioner's claim that its filings proposed a fundamental change in service from its previous "excess capacity transmission service" to a "firm transmission service," and that its filings therefore proposed an initial rate that was not subject to suspension. The Commission reasoned that petitioner was previously supplying transmission service to the municipalities under its 1955 contract with the Bureau, and that the municipalities were third party beneficiaries of that agreement. Even though the service being provided was excess capacity transmission service, "the basic service being rendered in both instances is transmission service" (Pet. App. E-6). Moreover, it noted, petitioner was already providing "firming transmission service" to the municipalities under the special agreements with them (Pet. App. E-5 to E-7).

After the expiration of the five-month suspension period on June 1, 1977, petitioner's new rate schedule went into effect. The Commission is currently conducting a proceeding to determine whether that rate schedule is just and reasonable (Pet. 19 & n.23).

4. Petitioner sought review of the Commission's action suspending the rate schedule for five months, and the court of appeals affirmed the Commission (Pet. App. A-1 to A-20). It stated that the Commission's decision whether to suspend a rate change is a non-reviewable exercise of agency discretion, but held that the characterization of a filing as a change rather than an initial schedule was reviewable because it affects the Commission's basic authority under the Act (*id.* at A-8). On the merits, the court held that the initial rates are those "set in the first instance by the public utility to cover new services rendered to new customers," while a changed rate "purports to modify or supersede a preexisting schedule" (*id.* at A-12). Under this test, the court concluded that the new filing was the same as "originally provided under the Bureau-Otter Tail contract, to-wit: wheeling service" (*id.* at A-15), and therefore upheld the Commission's authority to suspend the rate. The court also rejected petitioner's arguments that the Commission's characterization of the rate as a change in rates was inconsistent with an earlier decision (Pet. App. A-15), and that the result of the Commission's suspension produced an arbitrary disparity in rates among the different municipalities (*id.* at A-19 to A-20).

ARGUMENT

The court of appeals correctly upheld the Commission's determination that the rate schedule filed by petitioner in 1976 constituted a change in rates rather than an initial rate. That question in any event turns wholly on the factual similarities between that rate schedule and petitioner's previous rates and services. The decision below presents no issue of general importance, nor one as to which there is a conflict among the circuits. Accordingly, the case does not warrant this Court's review.

1. Petitioner contends at the outset (Pet. 14-20) that the Commission's characterization of its schedule as a change in rates (and thus subject to suspension) conflicts with the antitrust decree that was entered against it and upheld by this Court in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). The suggestion is that the antitrust decree, while enjoining petitioner from refusing to wheel power to municipalities, also provided that it could not be compelled to do so at non-compensatory rates; and petitioner asserts that the five-month suspension, which required it to wheel power at its previously filed rates for that period, compelled it to wheel power at non-compensatory rates.

Petitioner's contention that the antitrust decree prohibits the Commission from exercising its statutory power temporarily to suspend rates misconceives the effect of the decree. The judgment in the antitrust case enjoins petitioner from refusing to sell

electric power at wholesale, or to wheel power to municipal systems in its service area. 410 U.S. at 375. It also provides (*ibid.*):

> The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission.

The foregoing provision reflects the general constitutional principle that the government may not impose confiscatory rates on a utility (see, *e.g.*, *FERC* v. *Pennzoil Producing Co.*, No. 77-648 (Jan. 16, 1979), slip op. 10). But the provision also recognizes, as this Court recognized in *Otter Tail*, *supra* (410 U.S. at 376-377), that whatever rates petitioner charges for the services required by the decree will be subject to the provisions of the Federal Power Act, including the suspension provision of Section 205(e). Neither the decree nor the general constitutional prohibition against confiscatory rates is violated when the Commission—or any other agency operating under similar statutes—exercises its statutory authority temporarily to suspend the effectiveness of a filed rate pending an investigation of its lawfulness. Petitioner's contention to the contrary overlooks the nature and purpose of the suspension power.

The suspension provision of the Federal Power Act, like the parallel provisions of the Interstate Commerce Act (49 U.S.C. 15(8)), is not a means of

imposing rates upon a utility that implicates the constitutional prohibition against confiscatory rates. Rather, it is an administrative device designed to enable the Commission effectively to carry out its statutory responsibility of protecting the public from unlawful rates, and it reflects a careful balancing by Congress of the interests of utilities and consumers. Cf. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 662-669 (1963). Under a suspension order, the preexisting rates established by a utility may remain in effect for a period up to five months while the Commission determines whether the proposed changes are just and reasonable. Thereafter, the economic burden shifts to the consumers, even though some "might for a time have to pay unlawful rates because a proceeding might not be concluded and an order made within the [suspension] time." *Id.* at 665. When petitioner established the rates it now claims to be confiscatory in its 1955 wheeling contract with the Bureau of Reclamation and in its special agreements with the municipalities, it acted with knowledge that any changes in those rates it might propose in the future would be subject to suspension. Petitioner's obligation to continue service at its own previously established rates for a brief period necessary to allow an investigation into the lawfulness of its proposed rates violated neither the consent decree nor the Constitution; rather, it was "within the range of regulatory possibilities that must be anticipated by one profiting from interstate

operations." *California* v. *Southland Royalty Co.*, 436 U.S. 519, 529 n.6 (1978).[4]

2. Petitioner also errs in contending (Pet. 27-28) that the Commission's characterization of its filing as a change in rates, rather than as an initial rate, is inconsistent with its action in a previous case dealing with petitioner's tariff for wheeling power to the Village of Elbow Lake, Minnesota.

As the court of appeals noted (Pet. App. A-9), the Federal Power Act does not distinguish between or otherwise define initial rates and changed rates. Rather, that distinction was established by the Commission's regulations, which characterize a change in rate as any "rate schedule * * * which proposes to

[4] This Court has frequently recognized the validity of the similar suspension power under the Interstate Commerce Act, and has never suggested that the exercise of that power is precluded or limited by the constitutional principle against non-compensatory rates. See, *e.g.*, *Arrow Transportation Co.*, *supra*; *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978). Indeed, in the *Trans Alaska Pipeline Rate Cases*, the Court upheld the power of the Interstate Commerce Commission to suspend an initial rate; *i.e.*, when, unlike this case, the carrier had no previous rate on file that would be effective during the suspension period. Even in that situation, the Court noted that the carrier had not demonstrated that suspension of its initial rate would force it to operate on a non-compensatory basis during the suspension period, because the carrier was free to file another tariff during that period. 436 U.S. at 652 n.33. As a general matter, an agency's power temporarily to suspend a proposed rate pending investigation may be analogized to the power of an agency or court to require continued operation of an unprofitable interstate service pending reasonable efforts to investigate and devise a solution in the public interest. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 122-123 (1974).

supersede, supplement, cancel or otherwise change any of the provisions of a rate schedule required to be on file with the Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) * * *." 18 C.F.R. 35.1(c). The regulations characterize an initial rate as a rate schedule that is not a change in rates. 18 C.F.R. 35.1(b). See also 18 C.F.R. 2.4, 35.12, 35.13.[5]

In 1973 the Commission held that a rate schedule that petitioner had filed for providing service to the Village of Elbow Lake was an initial rate rather than a change in rate because "it effecte[d] a change in the nature of service to Elbow Lake * * *." (See Pet. App. E-7.) In the instant case the Commission held that the Elbow Lake rate schedule was different from the rate schedule involved here (Pet. App.

[5] The distinction between initial rates and changed rates in the Commission's regulations is based upon a 1945 memorandum entitled "Commission's Power to Suspend Rate Schedules." The memorandum, noting that the rate provisions in the Federal Power Act were modeled after similar provisions in the Interstate Commerce Act, 49 U.S.C. 6(1), 6(3), and 15(7), concluded from precedents under that Act that initial rates could not be suspended. In the *Trans Alaska Pipeline Rate Cases*, *supra*, this Court held that the Interstate Commerce Act authorized the Interstate Commerce Commission to suspend both initial rates and changed rates, and that decision thus casts substantial doubt on the conclusions of the 1945 memorandum. The distinction in the Commission's regulations between initial and changed rates may thus be viewed as a discretionary policy of the Commission not required by the Act.

E-7 to E-8). As the court of appeals pointed out (Pet. App. A-15):

> The essential difference between Elbow Lake and the intervenors [*i.e.* the municipalities] appears to be that when Elbow Lake contracted for wheeling service it was receiving wholesale electric service from Otter Tail. This was power provided, generated and transmitted by Otter Tail to Elbow Lake with no involvement of the Bureau. Under the schedule found to be an initial rate Elbow Lake is now paying Otter Tail only for wheeling electricity purchased from the Bureau. The intervenors, on the other hand, were receiving excess capacity wheeling service and are now receiving firm wheeling service.

The Commission's determination that, for purposes of its regulations, the rate schedule for Elbow Lake was different from the rate schedule involved in this case was rational, and the court of appeals correctly concluded (Pet. App. A-16) that "it is for the Commission to draw the line based on its technical expertise."[6]

3. Petitioner also contends (Pet. 20-27) that the Commission erred in suspending its rates because the suspension order resulted in petitioner's charging different municipalities different and thus discriminatory rates for the same service. Petitioner did not present this claim that the rates were discriminatory to the Commission, and may not raise it for the first time on judicial review. Section 313 of the Federal Power Act, 16 U.S.C. 825*l*(b); *FPC* v. *Colorado Interstate Gas Company*, 348 U.S. 492, 499-502 (1955).[7]

The claim in any event is without merit. The difference in rates among towns during the suspension period reflected the fact that some towns were receiving more service than others. Some towns were receiving both excess capacity transmission service under petitioner's contract with the Bureau of Reclamation (for 1 mill per kWh) and firm transmission service (at an additional 1.5 mill per kWh) under their own contracts with petitioner that did not expire until after the suspension period. Other towns were receiving only excess capacity service (at 1 mill per kWh) because their contracts with petitioner for firming transmission service had expired at various dates before the suspension period and they had elected not to continue to receive that service. Since the different rates reflected different levels of service, they were not discriminatory.[8] Moreover, as the court

[6] Petitioner also relies (Pet. 28) on the fact that the Commission has subsequently indicated that today it would regard the 1973 Elbow Lake filing as a change in rate rather than an initial rate. That is true, but the fact that the Commission now believes that it would have decided an earlier case differently does not mean that it erred in this case. Moreover, the Commission in this case reasonably distinguished, rather than overruled, the Elbow Lake case.

[7] Petitioner's standing to raise the claim that its own rates are discriminatory is also doubtful. Cf. *Public Service Co. of Indiana* v. *FERC*, 575 F.2d 1204, 1213 n.13 (7th Cir. 1978).

[8] For that reason, *Borough of Chambersburg* v. *FERC*, 580 F.2d 573 (D.C. Cir. 1978) and *Town of Norwood* v. *FERC*, No. 77-1326 (D.C. Cir. Oct. 23, 1978), on which petitioner relies for an alleged conflict (Pet. 25-27), are inapposite. Those cases involved claims by customers that a utility was

of appeals held (Pet. App. A-19), any disparity among the rates for transmission service to the cities "result[ed] not from the Commission's action, but rather from the varying termination dates * * * [which petitioner] voluntarily entered into." The Commission had no duty, in exercising its suspension power, to relieve petitioner of its own bargain. *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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discriminating against them by charging rates that were higher than rates for the same service that the utility had negotiated with other customers. This case concerns rates for different services and involved no complaint of discrimination by any customer.

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